Supreme Court, U.S.
FILED
JAN 18 1983
ALEXANDER L. STEVAS
CLERK

No. 82-741

In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

WILLIAM A. LUBBERS, ET AL., AND LOCKHEED MISSILES & SPACE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether a decision by the General Counsel of the National Labor Relations Board not to prosecute unfair labor practice charges filed by the petitioner was subject to judicial review in the district court.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Argument	6
Conclusion	11
Supplemental Appendix	1a

TABLE OF AUTHORITIES

Cases:

Associated Builders v. *Irving*, 610 F.2d 1221 7

Bandlow v. *Rothman*, 278 F.2d 866, cert. denied, 364 U.S. 909 7

Bays v. *Miller*, 524 F.2d 631 10

Benda v. *Grand Lodge of the International Association of Machinists*, 584 F.2d 308 .. 3

Detroit Edison Co. v. *NLRB*, 440 U.S. 301 6

General Drivers, Local 886 v. *NLRB*, 179 F.2d 492 7

George Banta Co. v. *NLRB*, 626 F.2d 354, cert. denied, 449 U.S. 1080 ..... 5, 8

Hernandez v. *NLRB*, 505 F.2d 119 7

International Union, UAW v. *Scofield*, 382 U.S. 205 6

Page

Cases—Continued:

Leedom v. *Kyne*, 358 U.S. 184 ..... 5, 9

Leeds & Northrup Co. v. *NLRB*, 357 F.2d 527 8

Lincourt v. *NLRB*, 170 F.2d 306 7

Linda R.S. v. *Richard D.*, 410 U.S. 614 7

Mayer v. *Ordman*, 391 F.2d 889 7

NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132 ..... 4, 6

National Maritime Union v. *NLRB*, 423 F.2d 625 7

Newspaper Guild, Local 187 v. *NLRB*, 489 F.2d 416 7

Rockford Redi-Mix Co. v. *Zipp*, 632 F.2d 30 7

Royal Typewriter Co. v. *NLRB*, 533 F.2d 1030 7

Saez v. *Goslee*, 463 F.2d 214 6

Southern California District Council of Laborers, Local 1184 v. *Ordman*, 318 F. Supp. 633 9-10

United Steelworkers (Lynchburg Foundry Co.), 192 N.L.R.B. 773 ..... 5, 9

Vaca v. *Sipes*, 386 U.S. 171 6

Page

Statutes:

Administrative Procedure Act (5 U.S.C. 701 *et seq.*) 2

National Labor Relations Act (29 U.S.C. 151 *et seq.*) 2

Section 3(d), 29 U.S.C. 153(d) 4, 6
Section 8(a)(1), 29 U.S.C. 158(a)(1) 3
Section 8(a)(5), 29 U.S.C. 158(a)(5) 3
Section 8(b)(3), 29 U.S.C. 158(b)(3) 4
Section 10(b), 29 U.S.C. 160(b) 9
Section 10(f), 29 U.S.C. 160(f) 8

701(a), 5 U.S.C. 701(a) 4, 7

Miscellaneous:

Legislative History of the Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess. (1946) 7

NLRB, *Legislative History of the Labor Management Relations Act, 1947* 6

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-741

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

WILLIAM A. LUBBERS, ET AL., AND LOCKHEED MISSILES & SPACE COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A12)[1] is reported at 681 F.2d 598. The order of the district court (Pet. App. A13-A14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 13, 1982. On October 1, 1982, Justice Rehnquist extended the time within which to file a petition for certiorari to and

---

[1]The reprinting of the court of appeals' opinion in the appendix to the certiorari petition omits page 6 of the slip opinion, which should have come after the phrase "in Section 701" on line 12 of Pet. App. A7. That page is reproduced as a Supplemental Appendix to this Brief, *infra*.

including October 29, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. 151 *et seq.*) ("the Act") and the Administrative Procedure Act (5 U.S.C. 701 *et seq.*) are set forth at Pet. App. A15-A17.

STATEMENT

1. In the summer of 1977, collective bargaining negotiations were commenced between petitioner Union and Lockheed Missiles & Space Company ("LMSC"), a wholly-owned subsidiary of Lockheed Aircraft Corporation. Although past practice had been to coordinate these negotiations with negotiations at other wholly-owned subsidiaries of Lockheed, the employees of each subsidiary had always voted separately to accept or reject a contract. Acceptance of a contract by the employees of one subsidiary did not preclude its rejection by employees of another. (Pet. App. A3-A4).

In October 1977, following the rejection of a contract proposal by the LMSC employees, those employees went on strike. When negotiations resumed the next month, petitioner informed the local employee representatives that thenceforth petitioner would conduct negotiations on a joint, unified basis, and that no proposal could be accepted absent a majority vote of the combined membership employed at all Lockheed subsidiaries (Pet. App. A4).

On November 22, three of the subsidiaries presented their final contract offers. The representatives of the LMSC employees voted to present the LMSC proposal to their membership, but the representatives of the employees at the other subsidiaries decided not to present the proposals to their members. Consequently, petitioner ruled that *all* the

proposals had been rejected. The LMSC representatives disagreed, and the officers of petitioner's District Lodge 508, which represented the LMSC employees, decided to present the proposal to its members. On November 25, petitioner suspended the officers of District Lodge 508 and placed the Lodge in trusteeship. Two days later, the LMSC employees voted to accept the contract proposal. (Pet. App. A4.)

Petitioner nevertheless attempted to continue the strike against LMSC. On December 6, 1977, the president of District Lodge 508 filed a suit in federal district court seeking an injunction to prohibit petitioner from maintaining the trusteeship and from interfering with LMSC employees who sought to return to their jobs. The district court granted the requested injunction on December 15, 1977. (Pet. App. A4-A5.)

The day before the district court suit was filed, petitioner filed charges in the Regional Office of the National Labor Relations Board alleging that LMSC had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. 158(a)(5) and (1)) by bypassing petitioner and dealing directly with District Lodge 508. The Regional Director, on behalf of the Board's General Counsel, issued a complaint based on this charge. Subsequently, however, processing of the complaint was deferred pending appeal of the preliminary injunction (Pet. App. A5).

The court of appeals affirmed the preliminary injunction, finding that the twenty-year history of separate voting by the employees of each subsidiary indicated that the officers of District Lodge 508 were properly carrying out their collective bargaining duties and that it was petitioner, not the lodge officers, that was interfering with the bargaining process (Pet. App. A5). See *Benda* v. *Grand Lodge of the International Association of Machinists*, 584 F.2d 308 (9th

Cir. 1978). The Regional Director then reviewed the case and determined that the unfair labor practice complaint should be withdrawn and the charge should be dismissed, because the investigation revealed that LMSC "had not unlawfully refused to bargain because it had at least a good faith belief that [petitioner] was engaging in bad faith bargaining in violation of Section 8(b)(3) [29 U.S.C. 158(b)(3)], *i.e.*, that [petitioner] was attempting to force [LMSC] to agree to 'coordinated bargaining' among the separate units, a non-mandatory subject of bargaining" (Pet. App. A5-A6). The Regional Director denied petitioner's request to reissue the withdrawn complaint, and the General Counsel, on petitioner's administrative appeal, upheld the Regional Director's action (Pet. App. A6).

2. Petitioner then filed the instant action in the United States District Court for the Northern District of California challenging the General Counsel's decision to withdraw the complaint. The district court held that the General Counsel's decision to withdraw an improvidently issued unfair labor practice complaint is not subject to judicial review and therefore granted the Board's motion to dismiss for lack of subject matter jurisdiction (Pet. App. A13-A14).

The court of appeals affirmed, observing that petitioner's attempt to secure review of the General Counsel's decision "is foreclosed by a clear line of contrary authority" (Pet. App. A3). The court reasoned that the decisions of the General Counsel to withdraw unfair labor practice complaints are not presumptively reviewable under the Administrative Procedure Act, because Section 3(d) of the National Labor Relations Act (29 U.S.C. 153(d)), its accompanying legislative history, and relevant judicial opinions (including *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-139, 155 (1975)), establish that such decisions are exempt from judicial review under 5 U.S.C. 701(a).

The latter provision makes review unavailable if "statutes preclude judicial review" or if the decisions are "committed to agency discretion by law" (Pet. App. A7-A8; Supp. App., *infra*, 1a). The court thus agreed that "the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court" (Supp. App., *infra*, 2a).

Nor, the court held, did this case fall within any exception to this rule of nonreviewability. The court noted that the General Counsel's decision here did not constitute an action "contrary to a specific prohibition in the Act" (Pet. App. A8-A9, quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)) and did not violate petitioner's constitutional rights (Pet. App. A9-A10). Moreover, with respect to petitioner's "purported third exception for actions 'wholly without a basis in law,' " the court noted that the Board decision cited by petitioner, *United Steel Workers (Lynchburg Foundary Co.)*, 192 N.L.R.B. 773 (1971), was distinguishable. Indeed, the court held that, in view of evidence indicating that petitioner sought to force a merger of separate bargaining units, the General Counsel's decision, far from being "wholly without basis in law," was based on "sound legal grounds" (*id.* at A10-A11).

Finally, the court rejected petitioner's attempt to distinguish the reviewability of the General Counsel's decision not to issue a complaint in the first instance from the reviewability of a decision to withdraw a previously issued complaint. In so ruling, the court expressed its agreement with the Fourth Circuit's decision in *George Banta Co.* v. *NLRB*, 626 F.2d 354 (1980), cert. denied, 449 U.S. 1080 (1981), "which held that when no settlement of a complaint is at issue, the decision to withdraw the charge is nonreviewable" (Pet. App. A3, A11-A12).

ARGUMENT

1. In *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975), this Court held that a decision by the General Counsel not to issue an unfair labor practice complaint represents "an *unreviewable* rejection of the charge filed by the private party" (emphasis added). Accord: *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 316 (1979). In *Sears*, the Court noted that in Section 3(d) of the Act (29 U.S.C. 153(d)), Congress delegated to the General Counsel "the unreviewable authority to determine whether a complaint shall be filed" (421 U.S. at 138), and explained (*id.* at 139):

> The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.[2]

---

[2]Consequently, petitioner's assertion (Pet. 13-16) that the fact that private rights are vindicated in Board proceedings and that private parties do have certain rights when complaints are actually adjudicated (*International Union, UAW* v. *Scofield*, 382 U.S. 205, 220 (1965)), does not establish that a private party may require the General Counsel to pursue the adjudication of a particular unfair labor practice charge. See *Saez* v. *Goslee*, 463 F.2d 214, 215 (1st Cir. 1972); Pet. App. A9-A10.

Equally without merit is petitioner's argument (Pet. 12) that the legislative history of Section 3(d) of the Act shows that Congress intended that decisions not to issue complaints were to be reviewable. This argument is based on Senator Taft's remark that, "So far as having unfettered discretion is concerned, [the General Counsel], of course, must respect the rules of decision of the Board and of the courts" (NLRB, *Legislative History of the Labor Management Relations Act, 1947*, 1623). In that same statement Senator Taft remarked that this provision simply "transfer[red] this 'vast and unreviewable power' [to decline to issue complaints] from this anonymous little group [the

This rule of nonreviewability has been consistently applied in every circuit.[3]

Thus, it is well settled that the General Counsel's decision not to issue a complaint is not, as petitioner contends (Pet. 8-11), presumptively reviewable under the Administrative Procedure Act, but rather falls within the exception in 5 U.S.C. 701(a) for situations in which review is precluded by statute or the action in question is committed to agency discretion. See pages 4-5, *supra*.[4]

Board's legal assistants] to a statutory officer [the General Counsel] responsible to the President and to the Congress" (*ibid.*). Moreover, Senator Taft further stated that, in exercising his prosecutorial discretion, the General Counsel's function "is like that of the attorney general of the United States or a State Attorney General" (*ibid.*)

The expectation reflected in the excerpts from Senator Taft's statement quoted by petitioner that the General Counsel will be guided by Board and judicial precedent in exercising his discretion whether to issue an unfair labor practice complaint thus does not suggest that the exercise of that discretion is subject to judicial review. The Attorney General, too, presumably is to be guided by precedent in deciding whether to prefer charges, but this does not mean that his decision declining to initiate a prosecution in a particular case is thereby subject to judicial review. See *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

[3]See *Lincourt* v. *NLRB*, 170 F.2d 306, 307 (1st Cir. 1948); *National Maritime Union* v. *NLRB*, 423 F.2d 625, 626-627 (2d Cir. 1970); *Newspaper Guild, Local 187* v. *NLRB*, 489 F.2d 416, 426 (3d Cir. 1973); *Associated Builders* v. *Irving*, 610 F.2d 1221, 1226 (4th Cir. 1979); *Hernandez* v. *NLRB*, 505 F.2d 119, 120 (5th Cir. 1974); *Mayer* v. *Ordman*, 391 F.2d 889, 890 (6th Cir. 1968); *Rockford Redi-Mix Co.* v. *Zipp*, 632 F.2d 30, 32-33 (7th Cir. 1980); *Royal Typewriter Co.* v. *NLRB*, 533 F.2d 1030, 1040 (8th Cir. 1976); *General Drivers, Local 886* v. *NLRB*, 179 F.2d 492 (10th Cir. 1950); *Bandlow* v. *Rothman*, 278 F.2d 866 (D.C. Cir.), cert. denied, 364 U.S. 909 (1960).

[4]In passing the APA Congress recognized that the Board's determination whether to issue a complaint was a matter committed to the agency's discretion and not subject to judicial review under Section 10 of the APA. See *Legislative History of the Administrative Procedure Act*, S. Doc. No. 248, 79th Cong., 2d Sess. 229-230 (1946).

2. Nor does the fact that here the General Counsel issued, but then withdrew, the complaint alter the outcome. Contrary to petitioner's contention (Pet. 16-18), this case is significantly different from *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527, 533 (3d Cir. 1966). There the court concluded that when the General Counsel seeks to *settle* a complaint proceeding, the charging party is "entitled to a hearing on its objections to [such an] informal settlement or compromise, entered into between the Regional Director and the charged party," because such a settlement *constitutes an adjudication* of the dispute which is subject to judicial review. Here, as in *George Banta Co.* v. *NLRB*, 626 F.2d 354, 357 (4th Cir.), cert. denied, 449 U.S. 1080 (1980),, where the Fourth Circuit dismissed an attempt by a charging party to secure review in the court of appeals under Section 10(f) of the Act, 29 U.S.C. 160(f), of the General Counsel's decision to withdraw (*not* settle) part of a complaint, the General Counsel's action was, in contrast to *Leeds & Northrup*, a "recognition that a cause of action could not be proved. As such, it was an unreviewable prosecutorial decision" (626 F.2d at 357).

Petitioner's effort (Pet. 19) to distinguish *George Banta* on the ground that there the General Counsel chose to withdraw the complaint "based essentially upon a determination that the available evidence will not support prosecution of the alleged violation" (626 F.2d at 356-357), while here the General Counsel "made no *evidentiary* finding that [petitioner's] charge could not be sustained" (Pet. 19; emphasis in original), is without merit. In the first place, the General Counsel did withdraw the complaint based on an assessment of the evidence: he determined that the facts

here would not support the position that LMSC had committed the alleged violation (see page 4, *supra*).[5]

Moreover, as this Court held in *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958), a Board action not reviewable through the normal appellate route is reviewable in district court only if "made in excess of its delegated powers *and contrary to a specific prohibition in the Act*" (emphasis supplied), not where the Board decision in question is one "within its jurisdiction" (*ibid.*). Petitioner does not contend that the General Counsel acted beyond his jurisdiction and contrary to a specific prohibition in the Act, but only that he acted in

---

[5]Accordingly, as the court of appeals noted (Pet. App. A10-A11), petitioner's contention (Pet. 7, 21, 25-28) that the General Counsel's withdrawal of the complaint was contrary to the Board's decision in *United Steelworkers (Lynchburg Foundry Co.)*, 192 N.L.R.B. 773 (1971), is unfounded. In *Lynchburg Foundry*, employees at separate plants owned by the same employer were represented by two independent locals of the same international union. Traditionally, the locals bargained for separate contracts, but the expiration dates of the contracts always coincided. In the contract negotiations preceding the filing of the unfair labor practice charge, the employer made a proposal, which if accepted by one unit but not the other "would result in obliterating the common expiration dates then contained in the two contracts." 192 N.L.R.B. at 776. This, the locals believed, would weaken the union's bargaining strength at both plants. *Ibid.* To make sure that the contract continued to have common expiration dates, the locals decided to submit the employer's proposal to one pooled ratification vote. *Ibid.* The issue in *Lynchburg Foundry* was whether this voting procedure was unlawful. The Board found that there was no evidence establishing that an object or effect of the locals' voting "procedure was to require the Company to bargain with [them] in a single combined bargaining unit composed of the employees from both plants." *Id.* at 779. Rather, the object of the pooled voting procedure was the lawful insistence upon maintaining common contract expiration dates. *Id.* at 778. Here, in contrast, the General Counsel found that LMSC reasonably could believe that petitioner's object was unlawfully to force the employer to bargain as if petitioner represented a "single combined bargaining unit."

conflict with Board decisional authority.[6] And, as we have shown (see note 5, *supra*), even that contention is erroneous, for the General Counsel's position here does not in fact conflict with Board authority.

---

[6] *Southern California District Council of Laborers, Local 1184* v. *Ordman*, 318 F. Supp. 633, 636 (C.D. Cal. 1970), relied upon by petitioner (Pet. 7), is inapposite. There the district court, disagreeing with the General Counsel, held as a matter of law that the limitations provision of the Labor Act, 29 U.S.C. 160(b), did not bar the filing of an unfair labor practice complaint. Accordingly, the district court ordered the General Counsel to consider the merits of the charge. The district court stated, however: "If, after considering the merits of plaintiffs' charges, [the General Counsel] concludes that no complaint should issue, no judicial review of [that] determination may be had." *Id.* at 636. Moreover, the Ninth Circuit, "[w]ithout deciding the validity of the *Local 1184* holding," has limited it to cases involving a "purely legal question." *Bays* v. *Miller*, 524 F.2d 631, 634 (1975). The instant case, in contrast to *Local 1184*, required the General Counsel to engage in "a complex weighing of facts to resolve" (524 F.2d at 634) the issue of whether LMSC had a "good faith belief" that petitioner was acting improperly in attempting to impose coordinated bargaining among separate bargaining units (Pet. App. A6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILLIAM A. LUBBERS
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID S. FISHBACK
Attorney
National Labor Relations Board

JANUARY 1983

DOJ-1983-01

of the APA applies in this case because section 3(d) of the Labor Management Relations Act (LMRA), 29 U.S.C. § 153(d) (1976), vests in the General Counsel exclusive prosecutorial authority over unfair labor practices. The statute provides that the General Counsel "shall have *final authority* on behalf of the Board, *in respect of* the investigation of charges and *issuance of complaints* under [the labor acts], *and in respect of the prosecution of such complaints before the Board* . . . ." *Id.* (emphasis added). Although the Supreme Court has not ruled on the reviewability of a decision by the General Counsel to withdraw and dismiss a complaint, section 3(d) of the LMRA has been construed to preclude review of the General Counsel's initial charging decisions. *E.g., NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 155 (1975); *Pacific Southwest Airlines* v. *NLRB*, 611 F.2d 1309, 1311 (9th Cir. 1980). The Court stated in *Sears*:

> . . . Congress has delegated to the Office of General Counsel 'on behalf of the Board' the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. § 153(d); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). In those cases in which he decides that a complaint shall issue, the General Counsel becomes an advocate before the Board in support of the complaint. In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

421 U.S. at 138-139.

The legislative history of section 3(d) confirms that the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court. See NLRB, *Legislative History of the Labor Management Relations Act, 1947*, 541, 882,